MAR 17 2003

No. 02-1192

IN THE
SUPREME COURT OF THE UNITED STATES

COOPER INDUSTRIES, INC., *Petitioner,*

v.

AVIALL SERVICES, INC., *Respondent.*

On Petition For a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves one issue. The question presented is whether a responsible party may bring an action for contribution under section 113(f) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9613(f), in the absence of a prior or pending federal "civil action" brought under sections 106 or 107 of CERCLA.

PARTIES TO THE PROCEEDING

A list of all of the parties to the proceeding in the Court whose judgment is the subject of this Brief in Opposition to Petition for a Writ of Certiorari is as follows:

Cooper Industries, Inc.

Aviall Services, Inc.

RULE 29(6) CORPORATE DISCLOSURE STATEMENT

Petitioner Cooper Industries, Inc. is a wholly-owned indirect subsidiary of Cooper Industries, Ltd.

Respondent Aviall Services, Inc. is a wholly-owned subsidiary of Aviall, Inc.

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STATEMENT OF THE CASE

This case is a garden variety CERCLA action. A party who purchased contaminated property is seeking contribution from the seller for an equitable share of the cleanup costs. Actions such as this one have been routinely brought in the many years since CERCLA was first adopted. There is nothing new or unusual about this case except, perhaps, Cooper's legal arguments.

The relevant facts in this case are not in great dispute. Aviall purchased property from Cooper. Much of the contamination came from actions of Cooper; some came from actions of Aviall. Both parties are thus among the group of persons who are potentially liable under section 107(a) of CERCLA. In terms familiar under CERCLA, they are both "potentially responsible parties" or "PRPs." Aviall is now cleaning up the property and seeks, through an action under CERCLA, to obtain an equitable allocation of cleanup costs between the parties.

Although there is little factual dispute, Aviall would like to clarify two potentially misleading statements by Cooper. First, it is not accurate to state that Aviall undertook a "voluntary clean-up" of the property. Pet. at 2. Aviall is cleaning up the property in response to compulsion from and under the supervision of the State of Texas. The record reflects that the State directed Aviall to clean up the property under threat of issuing an order (R. 1444-49, 1454-55, 1462-64, 1496-97, 1505-06, 1522-23). Second, Cooper has not dropped its claim for cost-recovery under

section 107(a)(4)(B) of CERCLA. Pet. at 3. Rather, Aviall amended its complaint to assert a claim jointly under sections 107(a)(4)(B) and 113(f) (R. 136). Aviall's position was mandated by the holding of the Fifth Circuit in *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917 (5th Cir. 2000), which interpreted a PRP's cost recovery action under CERCLA as arising jointly through the operation of sections 107 and 113.

REASONS FOR DENYING THE PETITION

The decision of the en banc panel of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. As a case of first impression there can, of course, be no conflict. The decision of the court of appeals is, in fact, consistent with the holdings of every court of appeals since Congress amended CERCLA in 1986 to "clarify and confirm" a right of contribution. The lack of conflict, the consistent approach of the courts of appeals, and the settled state of the law demonstrate the lack of any compelling federal interest that would justify this Court addressing this issue. Accordingly, further review is not warranted.

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS ON THIS ISSUE

A. *Aviall* is Acknowledged to be a Case of First Impression and Thus There is No Conflict Among the Circuits.

As the en banc dissenting opinion stated and as acknowledged by Cooper, this case raises an issue of first impression in federal courts of appeals. *Aviall*

Services, Inc. v. Cooper Indus., Inc., 312 F.3d 677, 695 (5th Cir. 2002)(Garza, J., dissenting); Pet. at 4. It has been more than fifteen years since Congress amended CERCLA to provide an express right of contribution. Since that time, no court of appeals has directly addressed the question of whether an action for contribution may be brought in the absence of a prior or pending "civil action" under sections 106 or 107 of CERCLA. As a case of first impression, by definition, there can be no conflict among the courts of appeals on this issue.

That this issue has never been addressed by a court of appeals is itself instructive. Notwithstanding the enormous potential liability and the extensive litigation under CERCLA, it appears that no litigant has thought this issue worthy of pursuing on appeal. As Judge Jones aptly stated in the en banc opinion below, the absence of litigation on this issue is "like the dog that didn't bark." *Aviall*, 312 F.3d at 689. One need not be a Sherlock Holmes to see how this absence of litigation belies Cooper's claim of a compelling federal interest in addressing this issue.

B. The Practices of Every Other Court of Appeals Are Consistent With the En Banc Opinion in This Case

The absence of prior holdings by the courts of appeals does not mean that this issue is unsettled. On the contrary, the practices of these courts over the past fifteen years speak for themselves: courts of appeals have uniformly allowed actions for contribution to proceed in the absence of a prior or pending federal "civil action." *See, e.g., Crofton Ventures LP v. G&H*

Partnership, 258 F.3d 292 (4th Cir. 2001) (action for contribution following voluntary cleanup under supervision of state); *Kalamazoo River Study Group v. Rockwell Int'l Corp.*, 274 F.3d 1043 (6th Cir. 2000) (action for contribution following consent order with state); *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917 (5th Cir. 2000) (action for contribution following cleanup pursuant to a private contract); *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998) (action for contribution brought following consent order with state); *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998) (action for contribution following federal administrative order); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610 (7th Cir. 1998) (action for contribution after state "required" cleanup); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997) (action for contribution following voluntary cleanup); *Sun Co., Inc. v. Browning Ferris, Inc.*, 124 F.3d 1197 (10th Cir. 1997) (action for contribution following federal administrative order); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930 (8th Cir. 1995) (action for contribution following cleanup under consent decree with state). Litigants have not raised the issue on appeal, and the courts of appeals have seen no need to raise it either. Thus, there is no conflict among the circuits in their conclusion that a claim for contribution may be brought in the absence of a federal "civil action."

Cooper tries to create a conflict by positing, not a conflict in holdings, but rather some conflict in "understandings" regarding the right of contribution. Pet. at 4, 26. Whatever Cooper may think a conflict of "understandings" means, the courts of appeals are

uniform in their understanding that an action for contribution by a PRP can proceed in the absence of a prior or pending federal civil action.[1]

C. The En Banc Opinion Below is Consistent With Settled Expectations Regarding the Scope of CERCLA.

As discussed above, since 1986 courts of appeals have routinely allowed PRPs to pursue actions for contribution in the absence of a prior or pending federal civil action. Although Congress has regularly

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[1] Cooper cites dictum in *Rumpke of Indiana v. Cummins Engine Co.*, 107 F.3d 1187 (7th Cir. 1997), in which a panel of the Seventh Circuit stated that "a § 106 or a § 107 action *apparently* must be either ongoing or already completed before § 113(f)(1) is available. This *appears* to be what the statute requires..." (emphasis added). Although this may be how the statute *appeared* to the panel, the issue was simply not before the court at that time, and the reference was pure dictum. Indeed, a subsequent opinion by the Seventh Circuit upheld a right of contribution in the absence of a prior civil action under sections 106 or 107. *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610 (7th Cir. 1998). Thus, the Seventh Circuit, in a manner consistent with all other circuits, has allowed actions for contribution to be brought under CERCLA in the absence of a federal civil action.

Cooper also cites to dictum in *In re Hemingway Co.*, 993 F.2d 915, 931 (1st Cir. 1993), which Cooper characterizes as "seemingly contrary" to the en banc decision below. What Cooper does not cite is the subsequent statement by the First Circuit that it has taken "no view" on the availability of a right of contribution following a voluntary cleanup. *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 99 n.8 (1st Cir. 1994). This is hardly a basis for finding a conflict among the circuits.

amended the liability provisions of CERCLA, it has never revised this understanding of the right of contribution. *See, e.g.*, Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub. L. No. 104-208, Div. A, Title II, Subtitle E, 110 Stat. 3009-462 (1996) (amending sections 101 and 107); Small Business Liability Protection Act, Pub. L. No. 107-118, Title I, 115 Stat. 2356 (2002); Brownfields Revitalization and Environmental Restoration Act of 2001, Pub. L. No. 107-118, Title II, 115 Stat. 2356 (2002). In short, CERCLA, from its inception to the adoption of an express right of contribution and thereafter, has been interpreted to provide a federal cause of action for PRPs who clean up property in a manner consistent with CERCLA requirements. No party could reasonably have assumed that a right of contribution existed only if a party had been the subject of a federal civil action. Existing business practice and financial arrangements are presumably based on this settled understanding. No confusion or clamor creates a compelling federal interest in this Court addressing this issue.

II. THE COURT OF APPEALS WAS CORRECT

Cooper devotes most of its petition to a presentation of its interpretation of section 113(f) in CERCLA. Indeed, the petition essentially rehashes the arguments presented to the full panel of the Fifth Circuit. Fully briefed and argued below, all but three of the judges of the Fifth Circuit considered and rejected Cooper's position. Aviall relies on the carefully reasoned opinion of Judge Jones in response to Cooper's arguments.

Aviall would, however, emphasize certain difficulties with Cooper's argument. First, Cooper claims that, in the absence of prior or pending litigation, an action by a PRP is not consistent with a common law right of contribution. Pet. at 18-21. Notwithstanding Cooper's assertion, the courts of appeals have overwhelmingly characterized a CERCLA cost recovery action by one liable PRP against another as a "quintessential claim for contribution." *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 423-24 (2d Cir. 1998); *United States v. Colorado & E. R.R.*, 50 F.3d 1530, 1536 (10th Cir. 1995); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 174 (7th Cir. 1994).

Second, Cooper claims that a right of contribution arises under section 113(f) only during or following a "civil action" under sections 106 or 107 of CERCLA. "Civil action" refers, of course, to a federal civil judicial proceeding.[2] If the right of contribution is limited by the first sentence of section 113(f) to an action brought during or following a "civil action," then parties who clean up contaminated property either (1) voluntarily, (2) following receipt of a federal

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[2] The Federal Rules of Civil Procedure expressly state: "There shall be one form of action to be known as 'civil action.'" FED. R. CIV. P. 2. Sections 106 and 107 of CERCLA both provide for such civil actions in federal court. Under section 106, the government may seek an order in federal court to compel the cleanup of hazardous substances. Under section 107, parties may bring an action in federal court to recover certain cleanup costs. Additionally, section 106 provides an alternative administrative mechanism in addition to a civil action. The EPA, the federal agency with delegated authority, may issue administrative orders compelling the cleanup of hazardous substances.

administrative order, or (3) following some form of state order or compulsion, would have no right of contribution.

This cannot be what Congress intended. Despite the limited legislative history of section 113(f), one fact is clear: prior to 1986, courts had allowed PRPs to pursue cost recovery actions against one another in the absence of federal litigation. Congress adopted section 113(f) simply to "clarify and confirm" an express right of contribution that had previously been found by many federal courts. Nothing in the legislative history indicates that Congress intended to restrict the availability of a federal cause of action by PRPs.

But Cooper's construction would do just that. In fact, it would eliminate any federal cause of action under CERCLA by PRPs who clean up property voluntarily, under state compulsion, or following a federal administrative order.[3] Under Cooper's logic, these PRPs lost the right of cost recovery as a result of Congress' intent to "clarify and confirm" their right to

[3] This conclusion arises because most courts of appeals have held that PRPs are limited to an action for contribution under section 113(f). *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2d Cir. 1998); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 776 (4th Cir. 1998); *New Castle County v. Halliburton NUS Corp.*, 11 F.3d 116, 120 (3d Cir. 1997); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United States v. Colorado & E .R.R.*, 50 F.3d 1530, 1536 (10th Cir. 1995); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994). If, as Cooper asserts, PRPs who voluntarily clean up property or who clean up property following a federal or state administrative order or under state compulsion have no right of contribution, then they would have no right of cost recovery under CERCLA at all.

contribution. Nothing in the legislative history indicates that Congress intended such a fundamental change in CERCLA.

III. This Case Raises No Other Issues That Warrant Review By This Court

In an attempt to bolster its argument for review by this Court, Cooper suggests that this case implicates several other issues under CERCLA. Cooper claims that this case somehow involves the issue of federal preemption of state claims for contribution. Pet. at 28. Cooper also implies that this case somehow involves an interpretation of the statute of limitations in section 113(g) of CERCLA. These claims can most charitably be described as "red herrings."

There is only one issue raised by this case: whether a PRP may bring an action for contribution in the absence of a prior or pending "civil action." There are, of course, numerous issues that may arise under CERCLA. Such issues include the relationship between sections 113(f) and 107(a)(4)(B), the scope of preemption of state cost recovery claims, and the application of CERCLA's statutes of limitations. These issues, however, were neither raised, briefed, nor decided in this case. Should this Court wish to address or clarify any of these matters, this case is simply not the appropriate vehicle.

CONCLUSION

The en banc opinion of the Fifth Circuit below properly interprets the meaning of section 113(f) of CERCLA. As a case of first impression, there is no

conflict among the circuits on this issue; indeed the federal courts of appeals are consistent in allowing actions for contribution in the absence of a prior or pending federal "civil action." There is no pressing federal interest justifying further review of this case, and thus, the petition should be denied.

Respectfully submitted,

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